IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ROSEMARIE DAWN CLARK,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11445
Trial Court No. 3PA-12-1111 CR

MEMORANDUM OPINION

No. 6173 — April 22, 2015

Appeal from the District Court, Third Judicial District, Palmer, William L. Estelle, Judge.

Appearances: David T. McGee, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Lindsey M. Burton, Assistant District Attorney, Palmer, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard and Kossler, Judges.

Judge ALLARD.

Rosemarie Dawn Clark was convicted in a bench trial of driving under the influence. She argues that she was denied her statutory right to make a phone call before she submitted to a breath test. She also argues that her right to confront the witnesses against her was violated because the district court admitted documents verifying the calibration of the DataMaster used for her breath test, even though she had no

opportunity to cross-examine the person who prepared the documents.[1] For the reasons explained below, we conclude that these claims have no merit.

Clark also argues that the district court relied on facts not in evidence. We agree that the trial judge erroneously relied on his personal knowledge regarding the horizontal gaze nystagmus test when the judge convicted Clark of driving under the influence under an "impairment" theory. But because the court separately convicted Clark under the "blood-alcohol" theory — the theory that her blood-alcohol level exceeded the legal limit of .08 percent — this error has no effect on the outcome of Clark's case and is therefore harmless.

Facts and proceedings

In the early morning hours of May 6, 2012, Sergeant Chris Watchus of the Wasilla Police Department initiated a traffic stop after he observed a vehicle veering out of its lane into the center median of the Parks Highway. When Sergeant Watchus contacted the driver, Rosemarie Clark, he noticed a strong odor of alcohol. After administering field sobriety tests, Sergeant Watchus arrested Clark for driving under the influence.

Clark was then transported to the Wasilla Police Department for a breath test. At the station, Sergeant Watchus processed Clark's arrest within earshot of another officer, Trooper Fredericks. Trooper Fredericks was speaking with a different arrestee about the logistics of making a phone call, and the trooper asked Sergeant Watchus if it was possible for the arrestee to make a long-distance call. Sergeant Watchus responded

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[1] Clark also argued that her conviction should be reversed because the DataMaster had not been properly verified under 13 AAC 63.100(c) but withdrew this claim following the recent Alaska Supreme Court decision in *Dennis v. State, Dep't. of Admin., Div. of Motor Vehicles*, 320 P.3d 1150 (Alaska 2014).

that the arrestee would need a long-distance calling card. At this point, Clark interjected: "What about a cell phone[?]" Sergeant Watchus then added, "Or a cell phone."

A short time later, Clark asked Sergeant Watchus: "Do I get my one phone call?" Sergeant Watchus affirmatively replied, "Uh huh." There was no further discussion of a phone call, and Clark agreed to provide a breath sample, which showed that her blood-alcohol level was .111 percent.

Clark was then charged with driving under the influence under both AS 28.35.030(a)(1) (the "under the influence" theory) and AS 28.35.030(a)(2) (the "blood-alcohol level" theory).

Before trial, Clark moved to suppress her breath test result, arguing that she was denied her right under *Copelin v. State*[2] to make a phone call before she submitted to a breath test. After an evidentiary hearing on the motion, the district court found that Clark's question — "Do I get my one phone call?" — was a "request for information" and a "comment on the right" to a phone call, but not an actual request to make a phone call. The court therefore denied the motion to suppress.

Clark was convicted in a bench trial under both AS 28.35.030(a)(1) and (a)(2) — that is, under the theory that she was impaired by alcohol at the time she drove, and under the theory that a breath test administered within four hours of driving showed that her blood-alcohol level exceeded the legal limit of .08 percent. Clark now appeals her conviction.

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[2] 659 P.2d 1206, 1215 (Alaska 1983).

Why we uphold the district court's finding that Clark did not request a phone call

Clark argues that she was denied her right under *Copelin v. State*[3] to make a phone call before deciding whether to submit to a breath test, and that the district court therefore erred in denying her motion to suppress.

Alaska Statute 12.25.150(b) provides, in pertinent part, that "[i]mmediately after an arrest, a prisoner shall have the right to telephone or otherwise communicate with the prisoner's attorney and any relative or friend." In *Copelin v. State*, the Alaska Supreme Court held that, under AS 12.25.150(b) and Criminal Rule 5(b), a person arrested for driving under the influence must, upon request, be given a reasonable opportunity to contact an attorney before submitting to a breath test.[4] (In *Zsupnik v. State*, the supreme court held that this right also includes the right a call to a friend or a relative.[5]) When a person invokes their right to make a phone call under *Copelin*, and the police improperly interfere with that right, the normal remedy is suppression of the breath test results.[6]

Clark argues that her question "Do I get my one phone call?" was an invocation of her right to make a phone call under *Copelin* and the district court erred in finding otherwise.

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[3] *Id.*

[4] *Id.*

[5] *Zsupnik v. State*, 789 P.2d 357, 360-61 (Alaska 1990).

[6] *Copelin*, 659 P.2d at 1214-15; *Zsupnik*, 789 P.2d at 361-63.

Whether a defendant's inquiry amounts to a request under *Copelin* is a question of fact for the trial court to decide under the totality of circumstances.[7] We will reverse the district court's finding only if clearly erroneous.[8]

Here, the record supports the district court's finding that Clark's statement was a comment on her general right to make a phone call rather than a request to make a phone call prior to taking the breath test under *Copelin*. As the district court found, after the trooper responded in the affirmative about her right to make a phone call, Clark "could have said any number of things" to indicate that she wanted to make a phone call prior to taking the breath test, including saying that she wanted to make a call, identifying who she wanted to call, or asking if she could use her cell phone to make a call. Instead, Clark said nothing else about making a phone call and took the breath test without further discussion or comment about her ability to make a phone call.

Accordingly, we conclude that the district court's finding that Clark did not invoke her right to a phone call under *Copelin* was not clearly erroneous and the court's ruling that Clark was not entitled to suppression of her breath test result was not error.

Clark's confrontation rights were not violated

At Clark's trial, the State offered documents verifying that the DataMaster instrument used for Clark's breath test was properly calibrated before and after her test. The reports were signed by the scientific director of the state breath-alcohol program, who did not testify at Clark's trial. Clark objected to the admission of these verification of calibration reports, arguing that admitting them without the testimony of the person

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[7] *Zsupnik*, 789 P.2d at 361-62.

[8] *Van Wormer v. State*, 699 P.2d 895, 898 (Alaska App. 1985), *overruled in part by Zsupnik*, 789 P.2d at 362-63.

who prepared them would violate her right to confront the witnesses against her. The court overruled that objection and admitted the reports.

On appeal, Clark renews her claim that the admission of these verification of calibration reports violated her confrontation rights. Clark acknowledges that we decided this issue against her in *Abyo v. State*,[9] but she argues that *Abyo* is bad law and should be overruled.

In *McCarthy v. State*[10] and *Fyfe v. State*,[11] we addressed whether *Abyo* was still good law following the United States Supreme Court decisions in *Melendez-Diaz v. Massachusetts*[12] and *Bullcoming v. New Mexico*.[13] We concluded that it was. We reaffirm those decisions here.[14]

Why we conclude that the district court's reliance on facts not in evidence was harmless beyond a reasonable doubt

As we noted earlier, Clark was convicted in a bench trial. She argues that the district court relied on facts not in evidence when it convicted her of driving under the influence under an "impairment" theory, because the court found that the horizontal

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[9] 166 P.3d 55, 60 (Alaska App. 2007).

[10] *McCarthy v. State*, 285 P.3d 285, 289 (Alaska App. 2012).

[11] *Fyfe v. State*, 334 P.3d 183, 190 (Alaska App. 2014).

[12] 557 U.S. 305 (2009).

[13] 131 S.Ct. 2705 (2011).

[14] *See State, Commercial Fisheries Entry Comm'n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003) (holding that appellate courts "will overrule a prior decision only when clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent").

gaze nystagmus test was the "most important" and "most reliable" field sobriety test, even though there was no testimony establishing these facts.

We agree that it was error for the court to make findings about the horizontal gaze nystagmus test that were not based on evidence in the record, particularly without giving the parties notice and an opportunity to respond. However, we conclude that the error was harmless beyond a reasonable doubt in this case, because the court separately convicted Clark under a "blood-alcohol" theory, based solely on the evidence that a breath test administered within four hours of driving showed that her blood-alcohol level was above the legal limit of .08 percent. Thus, even if we were to reverse Clark's conviction under the impairment theory, that decision would have no effect on the outcome of her case.

Conclusion

We AFFIRM the judgment of the district court.